

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1036-CR

Cir. Ct. No. 2012CT308

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN P. BRANDL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: GARY L. BENDIX, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Justin P. Brandl appeals from a judgment of conviction for a third offense of operating a motor vehicle while under the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12).

influence (OWI) after the trial court denied his motion to suppress evidence.² Brandl argues that the arresting officer did not have reasonable suspicion to justify an investigatory stop, but the circuit court found that reasonable suspicion was shown by the officer's observations of Brandl's motorcycle crossing over the fog line and nearly colliding with the motorcycle riding beside him. We affirm.

Facts

¶2 After he was charged with third-offense OWI in July 2012, Brandl moved to suppress the evidence, arguing that the officer lacked the reasonable suspicion necessary to stop Brandl's motorcycle. At the hearing on that motion, the arresting officer, who had twenty-three years of law enforcement experience, described his observations of Brandl's driving before the stop. First, at about 11:23 p.m., the officer saw Brandl and another motorcyclist drive out of the parking lot of a golf course where a band was playing. Brandl crossed over the fog line at the edge of his lane and almost struck one of the parked cars on the edge of the road. Next, the officer saw Brandl drive very close to the other motorcycle in his lane, within six inches of it, and then abruptly separate from it. Finally, after the two motorcycles passed another vehicle, the officer saw Brandl cross the fog line once again. At this point the officer activated his lights and sirens and stopped both motorcyclists.

² Brandl appeals from his conviction entered by the Honorable Gary L. Bendix, but the motion to suppress was denied by the Honorable Patrick L. Willis.

¶3 The circuit court concluded that these observations created reasonable suspicion justifying the stop and denied Brandl's motion to suppress evidence. Brandl appeals.

Discussion

¶4 On review of a motion to suppress evidence, the appellate court defers to the trial court's findings of fact unless they are clearly erroneous, *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990), and reviews the constitutionality of a search or seizure de novo, *id.* at 138. The arresting officer must have reasonable suspicion to justify the stop. WIS. STAT. § 968.24. Reasonableness depends on the totality of the circumstances. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶5 The test is a commonsense one that asks whether a reasonable police officer, in light of his or her training and experience, would have suspected that the defendant was committing, had committed, or was about to commit a crime. *State v. Jackson*, 147 Wis. 2d 824, 833-34, 434 N.W.2d 386 (1989). The State must establish specific and articulable facts, along with inferences from those facts, that reasonably warrant a stop. *Id.* at 829. An "inchoate and unparticularized suspicion or 'hunch'" will not suffice. *State v. Anderson*, 155 Wis. 2d 77, 88, 454 N.W.2d 763 (1990) (quoting *Terry v. Ohio*, 392 U.S. at 1, 27 (1968)).

¶6 Brandl contends that because the officer did not observe any traffic violations or erratic driving, no specific facts gave rise to reasonable suspicion. However, driving does not need to be erratic, unsafe, or illegal to be part of the totality of the circumstances giving rise to reasonable suspicion justifying an investigatory stop. *Post*, 301 Wis. 2d 1, ¶26. Weaving within a single lane of

traffic does not necessarily give rise to the reasonable suspicion necessary to conduct an investigatory stop, *id.*, ¶18, but such driving is a fact to be considered in the totality of the circumstances. In *Post*, for instance, reasonable suspicion was established where the driver was weaving across the travel and parking lanes in an S-pattern. *Id.*, ¶¶36-37. Similarly, reasonable suspicion was shown in *State v. Popke*, 2009 WI 37, ¶26, 317 Wis. 2d 118, 765 N.W.2d 569 (2009), when, over the distance of a single block, at approximately 1:30 a.m., the arresting officer observed a vehicle swerve to the extent that three-quarters of the car was in the left lane. *Id.*, ¶¶3-4.

¶7 Like in *Post* and *Popke*, here the totality of the circumstances supported reasonable suspicion for the investigatory stop. An officer observed Brandl driving away from a concert after 11 p.m. Brandl swerved over the fog line twice within one-tenth of a mile. Brandl nearly struck a parked car as well as the motorcycle driving beside him. Thus Brandl's driving was very similar to that in *Popke* and even worse than the driving observed *Post*.³ There were sufficient specific and articulable facts giving rise to reasonable suspicion that Brandl was driving while intoxicated.

¶8 Brandl's reliance on *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), is misplaced. *Waldner* explains that the requisite level for reasonable

³ Brandl's argument that the officer's request that Brandl move his stopped vehicle slightly up the road nearer his companion somehow refutes the officer's suspicions that Brandl was driving while intoxicated is a nonstarter. As the officer explained, it was an extremely short distance and Brandl drove very slowly. At that stage the officer only had reasonable suspicion, and it was reasonable in the circumstances to ask Brandl to move up slightly so that the two drivers the officer had pulled over were closer together. Brandl's ability to safely move his motorcycle in this manner while being observed by the officer was a factor to consider but did not outweigh the poor driving already observed.

suspicion occurs when the accumulated facts reach a sum of suspicion greater than each individual fact. *Id.* at 58. What matters here is not only that Brandl crossed over the fog line twice but that he almost struck a parked car on his right and nearly collided with his companion on his left. Though it may have been lawful, Brandl's driving demonstrated a lack of control of his vehicle and certainly supported a finding of reasonable suspicion.

¶9 In view of the totality of the circumstances, there were sufficient specific and articulable facts, taken together with rational inferences from those facts by this experienced officer, to give rise to the requisite level of reasonable suspicion necessary for an investigatory stop.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

